

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of |) | |
| Request for Comment on Petition |) | Docket No. MB 03-206 |
| Regarding DBS Public Interest |) | |
| Obligations and Private Contractual |) | |
| Arrangements |) | |

To: The Media Bureau

COMMENTS OF DOMINION VIDEO SATELLITE, INC.

Dominion Video Satellite, Inc. ("Dominion"), by its counsel, hereby submits these *Comments* in the above-captioned proceeding, which is the subject of a Public Notice¹ released by the Commission on September 16, 2003. The Commission issued the Public Notice in response to the "Request for Section 403 Inquiry and for Declaratory Ruling" ("*Request*") filed on August 19, 2003 by Word of God Fellowship, Inc. d/b/a Daystar Television Network ("Daystar"). Dominion has already filed a detailed *Opposition*² to Daystar's *Request*, which it incorporates by reference, but takes this opportunity to bring a few brief, but important, additional points to the Commission's attention.

1. Daystar's *Request* Raises No Existing Rule Violation.

In addition to the reasons set forth in Dominion's *Opposition*, the Commission should deny Daystar's *Request* because Daystar does not allege that there is any Commission rule precluding a Direct Broadcast Satellite ("DBS") provider from entering into a contract for

¹ *Request for Comment on Petition Regarding DBS Public Interest Obligations and Private Contractual Arrangements*, Public Notice, DA 03-2884 (rel. Sept. 16, 2003).

² See Dominion Video Satellite, Inc.'s *Opposition to Daystar Television Network's Request for Section 403 Inquiry and Declaratory Ruling* (filed Sept. 2, 2003) ("*Opposition*"). On October 10, 2003, Dominion submitted a letter to the Commission's Enforcement Bureau with respect to the arguments raised in Sections 3 and 4 of the *Opposition*. Dominion defers to the Commission the determination of whether the Enforcement Bureau is the more appropriate venue in which to address those arguments.

exclusivity, such as that between EchoStar Satellite Corp. (“EchoStar”) and Dominion. A DBS provider’s public interest obligations do not prohibit such contracts.³ Nor does an exclusivity contract violate any Commission policy regarding arrangements between parties that are Commission licensees. Instead, Daystar merely cites and misconstrues rules regarding other services, which are inapplicable to DBS, and proceeds to argue that these inapplicable rules should invalidate exclusivity contracts, such as that between EchoStar and Dominion.

The Dominion-EchoStar contract — and in particular its programming-exclusivity agreement — does not violate any Commission rule or policy, and thus Daystar’s *Request* does not present an issue for the Media Bureau to interpret or decide. Daystar appears to argue that the Commission should invalidate contracts negotiated between two independent companies simply because Daystar does not like the deal the companies struck. This is obviously improper. Daystar’s request that the Media Bureau announce a new substantive rule forbidding DBS operators from entering into programming-exclusivity contracts amounts to nothing more than an attempt to perform an “end-run” around existing Commission rules and procedures. The Commission should deny this improper request.

2. The Rules That Daystar Cites Do Not Apply To DBS Operators Such As Dominion And EchoStar.

The Commission rules that Daystar does cite do not apply in the DBS context. First, Daystar tries to shoehorn the Dominion-EchoStar contract into rules governing over-the-air broadcasts. Citing Section 73.658(a) — a rule prohibiting broadcast television stations from entering into exclusive agreements with networks — Daystar insists that “[i]f a DBS provider is

³ See 47 C.F.R. § 25.701.

analogous to a television station ... the DBS provider should be prohibited from entering into an [exclusive] agreement with a program supplier”⁴

Daystar’s premise is faulty. It is settled law that DBS providers are *not* analogous to television stations. *See National Ass’n for Better Broad. v. FCC*, 849 F.2d 665, 669 (D.C. Cir. 1988) (upholding a Commission determination that DBS services are not “broadcasting services,” but are instead point-to-multipoint non-broadcast video services).⁵ The analogy also fails because Dominion is not a program supplier. Rather, Dominion is itself a DBS operator that has a complicated technical contract with another DBS operator (EchoStar) under which the parties share satellite transponder capacity and receiving equipment. The benefit of the exclusivity arrangement flows to both parties by encouraging EchoStar subscribers to receive religious programming from Dominion and Dominion subscribers to obtain their other programming from EchoStar (*i.e.*, both parties’ subscribers use the DISH-brand receiving equipment). Accordingly, Daystar’s first alleged violation involves a rule that does not apply to Dominion, and even if it did, the rule would not be applicable because the contract is between two independent DBS providers – not between a provider and a programmer.⁶

⁴ *Request* at 6-7. Although Daystar cites Section 73.658(a), it fails to note that Section 73.658(m)(2) specifically permits exclusive arrangements among television stations and non-network stations. *See* 47 C.F.R. § 73.658(m)(2) (a broadcast television station “may enter into a contract, arrangement, or understanding with a producer, supplier, or distributor of a non-network program if that contract, arrangement, or understanding provides that the broadcast station has exclusive national rights such that no other television station in the United States may broadcast the program.”). In addition, the Commission has adopted rules recognizing the exclusivity rights of broadcast stations, such as Section 76.123, requiring that DBS operators block programs in a particular market if a local TV station carrying the same program asserts exclusivity.

⁵ The Commission regulates DBS pursuant to regulations entirely different from those governing television. Whereas television stations are subject to the broad regulations of Part 73, operating DBS providers have never been subject to those rules.

⁶ Whether via intent or ignorance, Daystar mischaracterizes the contract. The exclusivity arrangement between EchoStar and Dominion preserved EchoStar’s right to broadcast (i) (continued)...

Another Commission rule that Daystar cites applies only to cable operators, not DBS providers. Daystar cites Section 76.1002, which requires prior FCC approval of certain exclusive cable agreements.⁷ The Commission previously had occasion to consider exclusivity agreements between a DBS provider (USSB) and program providers (Time Warner and Viacom), which another DBS provider and a distributor of that provider's service contended were in violation of Section 76.1002. The Commission specifically declined to extend Section 76.1002's prohibition on exclusive contracts to DBS providers. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, MM Docket No. 92-265, FCC 94-326, 10 FCC Rcd 3105, para. 33 (1994) (declining to "broaden the scope of Section 76.1002(c)(1) to prohibit per se the exclusive DBS contracts at issue."). In fact, the Commission concluded that it was not the intent of Congress to extend the rule to DBS operators.⁸

Finally, and contrary to Daystar's allegations, the exclusivity arrangements between Dominion and EchoStar do not impact "must-carry" rights. Because EchoStar is *required* under Section 76.66 of the Commission's rules to carry all television stations (including stations with a Christian programming format) in markets to which EchoStar provides local-into-local service, the contractual exclusivity arrangement must yield. This is quite different from the capacity reservation for public interest programming, a requirement which EchoStar can satisfy without violating the exclusivity agreement.

Christian-themed channels with which it had already contracted, and (ii) one Christian-themed channel broadcast by Dominion.

⁷ *Request* at 7 (citing 47 C.F.R. § 76.1002).

⁸ *Id.* para. 42.

3. The Dominion-EchoStar Exclusive Arrangements Are Not Inconsistent With The Public Interest.

The premise of DayStar's objection derives from the misguided notion that exclusive contracts between private parties somehow undermine or interfere with public interest objectives. This is untrue.

The exclusivity arrangement between EchoStar and Dominion lies at the heart of their business arrangement. Exclusive access to a niche market is fundamental to Dominion's business. Dominion's DBS operation, however, has contributed greatly to a diverse programming line-up serving the public interest. Dominion gives away air time to a multitude of voices in the United States that are traditionally underserved (or not served at all) by other multi-channel carriers. For example, Sky Angel, Dominion's DBS service, has contributed to the creation of a brand new 24-hour Hispanic television channel, "FE TV," which was launched this summer on Sky Angel. It also has contributed to the creation of: "KTV-Kids and Teens Channel," a non-profit 24-hour children's channel built in the PBS educational tradition; "TVU," a 24-hour teen channel that educates youth on the dangers of drugs and violence and promotes positive behavior; "Angel One," which provides no-cost program air time to a variety of underserved minority groups (such as Native Americans, Asian, Hispanic and African American programmers.) Because of Dominion's exclusivity arrangement with EchoStar, the available spectrum may be used to provide more programming choices. It is critically important to Dominion's survival that the exclusivity provisions remain intact.

The Dominion-EchoStar exclusivity agreement does not violate any existing Commission rule. Nor does the agreement allow EchoStar to evade or be excused from existing rules applicable to DBS providers, including the requirement that DBS operators set aside four percent of available channel capacity for eligible public interest programming. As explained in Dominion's earlier submission, a U.S. District Court has already found that EchoStar can easily

comply with the exclusivity agreement and also fulfill its FCC regulatory obligation. Moreover, EchoStar has discretion to allocate public interest capacity among programmers. Implementing that allocation by means of a contract that limits the number of public interest channels it broadcasts within a particular genre is not contrary to any Commission rule or policy. EchoStar can reach the same result with or without the contract.

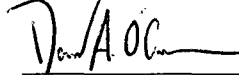
4. Conclusion.

Daystar has cited only three Commission rules, none of which by their terms preclude the type of contract at issue in this case. Daystar has thus raised no valid rule or policy violation for the Media Bureau to remedy. Accordingly, there is no applicable rule or policy upon which the Commission may issue a declaratory ruling.

For the reasons set forth above, and the reasons set forth in the *Opposition*, Dominion requests that the Commission deny the *Request*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Vicki Redman, an employee of Holland & Knight LLP, hereby certify that on October 16, 2003, a copy of the foregoing "Comments of Dominion Video Satellite, Inc." was served, via first-class mail unless otherwise noted, to the following individuals:

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